



November 6, 2000

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2000-4318

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 140998.

The Texas Department of Insurance (the "department") received a request for a complete copy of a complaint file concerning a specified insurance agent and two insurance companies. You state that some of the requested information will be provided to the requestor. You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103(a) provides the following:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

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You also claim that the entire complaint file should be withheld as attorney work product under section 552.103. In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold attorney work product under section 552.103 or section 552.111 of the Government Code if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), and (2) that the information consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 at 5 (1996).

With regard to item (1) above, under the *National Tank* test, it must be shown that a reasonable person would have concluded that there was a substantial chance that litigation would ensue and that the party resisting disclosure believed in good faith that there was a substantial chance that litigation would ensue and prepared or collected the information in question for purposes of such litigation. *National Tank Co.*, 851 S.W.2d at 207; Open Records Decision No. 647 at 4 (1996).

You explain that the enforcement section of the department currently has a file pending regarding the specified insurance agent and companies and is investigating this file for violations of the Insurance Code. You have also provided an affidavit from a department attorney who states that it is the intent of the department to initiate an enforcement action which will be conducted under the Administrative Procedures Act ("APA"), chapter 2001 of the Government Code. See Open Records Decision No. 588 at 7 (1991) (contested cases under the APA are considered litigation under section 552.103). Based on your representations and our review of the submitted information, we conclude that you have shown that litigation involving the department is reasonably anticipated and that the complaint file was prepared for purposes of litigation.

With regard to the second prong of attorney work product, we note that in *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and that, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. Likewise, in applying the attorney work product privilege in the context of the Public Information Act, and pursuant to the rationale set forth in *National Union*, this office has stated that where a requestor seeks an attorney's entire file regarding particular litigation, such a request may be denied in its entirety under the attorney work product aspect of sections 552.103 and 552.111. See Open Records Decision No. 647 at 5 (1996). Because the requestor in this instance seeks a complete copy of the department's complaint file, we find that the requestor is essentially asking the department to release its entire investigative file concerning the insurance agent and the insurance companies. Therefore, we conclude that the department may withhold all of the submitted information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

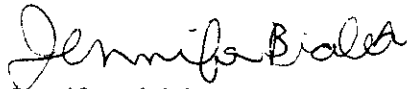
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Bialek".

Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\er

Ref: ID# 140998

Encl: Submitted documents

cc: Mr. Vance W. Hinds
Attorney at Law
108 West Main Street
Waxahachie, Texas 75165
(w/o enclosures)